Cameron Ford's Supreme Court case notes

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CRIMINAL LAW

Intentional exposure to indecent film

In *Witt v The Queen* [2018] NTCCA 9, the Court of Criminal Appeal allowed an appeal from a conviction of intentionally exposing a child under the age of sixteen years to an indecent film contrary to s 132(2)(e) and (4) of the *Criminal Code* because the jury were given an aide memoire at the request of the Crown and with which defence counsel agreed that said the Crown had to prove the accused intended to expose the victim to the film or *foresaw that a possible consequence of his conduct in inviting VP into the room was that she would be exposed to the indecent film*. Section 132(2)(e) expressly referred only to intentional exposures. The proviso did not apply because the irregularity was such a departure from the essential requirements of the law that it went to the root of the proceedings. The appellant was acquitted because he had only been sentenced to the rising of the court and he had been tried on the same offence twice previously, the first jury being unable to reach a verdict, and the second jury probably convicting on the basis of foresight rather than intention.

One appeal only

In *Kinkade v The Queen* [2018] NTCCA 4, the Court of Criminal Appeal confirmed that only one appeal lies under ss 410 and 411 of the *Criminal Code 1983* (NT), with a provision allowing that "the convicted person may appeal against the conviction" being properly construed to mean one appeal only. The appellant had lost an appeal in 2011 and sought leave to appeal again in 2017 on different grounds.

Sentences backdated for quasi-custody

In *Lovegrove v The Queen* [2018] NTCCA 3 the Court of Criminal Appeal held that a sentence may be backdated to take into account time spent on bail subject to electronic monitoring and time spent in a residential facility for the treatment of drug or alcohol addiction. The regime must be capable of characterisation as "quasi-custodial" in terms of discipline, structure, demands, strictures, expectations and work before it will warrant the exercise of the discretion to backdate sentence. The time spent in "quasi-custody" can be taken into account in fixing the length of the head sentence; in determining what period of further custody is necessary and appropriate having regard to the nature of the offending, and for that to be given effect in fixing the non-parole period or by an order suspending sentence; or in fixing the time to which the sentence is backdated. While it would not be a sentencing error to take it into account in fixing the head sentence, it will often be preferable to make allowance for it by backdating the sentence.

Sentencing for cannabis supply

In *Whitlock v The Queen* [2018] NTCCA 7, the Court of Criminal Appeal dismissed an appeal from a sentence of seven years' imprisonment for supply 18.5 kg and possessing 4 kg of cannabis. The court said contentions of inadequate or excessive weight to a sentencing factor is properly viewed as a particular of the assertion of manifest excess and it is neither possible nor necessary for an appeal court to reach any particular conclusion about the allocation of weight to a factor. There is no principle requiring offending involving a greater quantity to necessarily receive a heavier sentence than offending involving a lesser amount but the quantity may be highly relevant to the objective seriousness and the harm likely to be caused to the community. The court can consider the objective street value of the drug and is not obliged to consider the accused's net profit. A 25 per cent reduction in sentence will be usual for a plea at the earliest opportunity that is both facilitative to the administration of justice and indicative of true remorse, but it there is no set value and it is a matter for discretionary determination.

Sentencing – Good character in cannabis supply

In *Cook v The Queen* [2018] NTCCA 5, the Court of Criminal Appeal dismissed an appeal against sentence brought partly on the ground the sentencing judge said good character was to be given less weight in cases of the commercial supply of drugs. The accused was the principal in the cross-border transportation and supply of more than 10 kg of cannabis with the sole purpose of making around $80 000. The court said at [25] that where there is a principal offender involved in the importation or supply of a significant quantity of illegal drugs for commercial gain, and there are no relevant mitigating circumstances, ordinarily the weight to be given to general deterrence, punishment, denunciation and protection of the community will be the main sentencing factors. The corollary is that less weight is given to other factors such as prior good character but that is not to say that in all cases little weight will be given to previous good character: it will always depend on the circumstances with the usual balance exercise.

Suspend sentence vs non-parole

In *Cook v The Queen* [2018] NTCCA 5, the Court of Criminal Appeal dismissed an appeal against a sentence of four years six months suspended after three years for the cross-border transportation and supply of more than 10 kg of cannabis. The court said at [33] that the 2016 increase in the minimum non-parole period for drug offences from fifty per cent to seventy per cent of the head sentence did not mean that there must be a longer actual term of imprisonment for sentences under five years than would have been the case. The court still retains a complete discretion as before. It said at [36] that all of the factors relevant to the imposition of the head term of imprisonment must be revisited in determining whether to suspend that term. There is a significant difference between a non-parole period and a partly suspended sentence. Offenders are not automatically released at the end of the non-parole period but are if the sentence is suspended. Prisoners on parole are subject to conditions which may be revoked administratively without a right to be heard. Suspended sentences are only subject to conditions actually imposed. Here the sentencing judge considered that the offending was of such seriousness that a minimum of three years was required to meet the need for general deterrence and condign punishment.

CIVIL COSTS

Calderbank offer ineffective

In *Outback Ballooning Pty Ltd v Work Health Authority & Anor* [2018] NTCA 2, the Court of Appeal declined to award indemnity costs to a successful appellant who relied on a purported *Calderbank* offer. Before the trial the appellant had written to the respondent asking the respondent to concede the appeal otherwise it would suffer the prospect of bearing more significant costs than would ordinarily be ordered. The court said that there is no presumption that a party who rejects a *Calderbank* offer should pay the more successful party's costs on an indemnity basis if the unsuccessful party receives a less favourable re ult. The principal consideration is whether in all of the circumstances of the litigation, the rejection of the offer was unreasonable. Here the letter was not an offer of compromise but a suggestion of total capitulation, the respondent had succeeded before the Supreme Court, and it was a statutory authority concerned with the administration of the regime. It was not unreasonable for it to have rejected the offer and there was nothing else in its conduct to attract an order for indemnity costs.

Certifying for two counsel

In *Outback Ballooning Pty Ltd v Work Health Authority & Anor* [2018] NTCA 2, the Court of Appeal certified costs for two counsel because two significant, specialist areas of law requiring significant expertise—constitutional law and aviation regulation—including matters arising under the Chicago Convention; the outcome of the appeal may have determined whether the appellant was prosecuted; the case was serious as well as be attended by technicality; he subject matter of the two principal areas of law could readily be divided between two counsel; the range of subordinate legislation dealing with the Commonwealth regularity scheme was voluminous and complex; proper and efficient representation required substantial preparation and research. This was the case even though the issues were the same as on the trial and one counsel ably represented the respondent.

NEGLIGENCE

Child Support Agency no duty to prevent psychological injury

In *Monck v Commonwealth of Australia* [2018] NTCA 1 the Court of Appeal denied leave to appeal from the Associate Judge and held that the Commonwealth Child Support Agency does not have a common law duty of care to avoid causing nervous shock to persons who may be subject to the assessment and collection of child support levies in the public interest. The court confirmed that the child support legislation is a valid exercise of the Commonwealth's legislative authority and that the compulsory garnishment of moneys from a bank account under the child support legislation is not an acquisition of property in the constitutional sense.